(13)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 833

HAZEL E. CRANSTON,

Petitioner,

vs.

RANSFORD C. THOMPSON AND FRANK B. THOMPSON AND MARTHA A. BROWN.

No. 834

HAZEL E. CRANSTON,

Petitioner,

vs.

RANSFORD C. THOMPSON, FRANK B. THOMPSON, AND RANSFORD C. THOMPSON, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF SARAH A. THOMPSON, DECEASED.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

CLARENCE G. PICKARD,
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Petition for Writs of Certiorari.

The petitioner above named respectfully prays that writs of certiorari be issued from the Supreme Court of the

United States directed to the Circuit Court of Appeals for the Second Circuit commanding that court to certify for review and determination a transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 48, October Term, 1942, Martha A. Brown, plaintiff, against Hazel E. Cranston, defendant and third party plaintiff (appellant) against Ransford C. Thompson and Frank B. Thompson, third party defendant (appellees), and in the case numbered and entitled No. 49, October Term, 1942, Ransford C. Thompson, as Executor of the last Will and Testament of Sarah A. Thompson, deceased, plaintiff, against Hazel E. Cranston, defendant and third party plaintiff (appellant) against Ransford C. Thompson and Frank B. Thompson, third party defendants (appellees), and that the decrees of the Circuit Court of Appeals and the judgments of the District Court as decreed may be reversed, and that the petitioner may have such other and further relief as may be just and proper.

Opinions Below.

The opinion of the District Court, is reported in 2 Federal Rules Decisions 270 (R. 39). The opinion of the Circuit Court of Appeals is reported in 132 F (2d) 631 (R. 54).

Jurisdiction.

The order and judgment of the Circuit Court of Appeals was entered on December 23rd, 1942. The jurisdiction of the Supreme Court is invoked under Section 240 (A) of the Judicial Code as amended by the Act of February 13th, 1925 (U. S. C. A. Title 28, Section 347).

Statutes and Rules Involved.

Construction of one of the Federal Rules of Civil Procedure promulgated by this Court at its October 1937, term

and two acts of the New York State Legislature are directly involved. All are printed in full in Appendix A of this brief. The Federal Rule of Civil Procedure is Rule 14-a. The acts of the New York State Legislature are Section 193, Sub-division 2 of the Civil Practice Act (Laws of 1920, Chapter 925, as amended by Laws of 1922; Chapter 624, and Laws of 1923, Chapter 250, and Section 211-a of the Civil Practice Act as amended by Laws of 1928, Chapter 714).

Summary Statement of Matter Involved.

These are two companion actions arising out of the same automobile accident. In each case, the plaintiff sued Hazel E. Cranston alleging negligence (R. 3; 25). The plaintiff, Martha A. Brown and plaintiff's testate, Sarah A. Thompson, were passengers in an automobile alleged to be driven by Frank B. Thompson and owned by Ransford C. Thompson. This automobile collided at a highway intersection in Chautauqua County, New York, with an automobile operated by Hazel E. Cranston. The accident occurred August 20th, 1940. Plaintiff, Martha A. Brown, received injuries for which she sued Hazel E. Cranston, and Sarah A. Thompson received injuries which are alleged to have resulted in her death September 19th, 1940 (R. 4).

After the institution of the actions, the defendant, Hazel E. Cranston, answered (R. 5; 26), and thereafter moved under Rule 14-a of the Federal Rules of Civil Procedure to bring in Ransford C. Thompson and Frank B. Thompson as third party defendants (R. 7; 28). Her application was granted in each case (R. 10; 31). No one opposed the application (R. 11, 31), and in fact, the plaintiffs consented thereto. The defendant, Cranston, thereupon filed her third party summons and complaint (R. 12; 33).

The third party defendants appeared and moved to vacate the order bringing them in (R. 15), and this motion

was granted (R. 22; 36), and appeals from that order were taken to the Circuit Court of Appeals for the Second Circuit (R. 24; 37), where the determination was affirmed (R. 59, 60).

It is undisputed that the plaintiffs are citizens of the State of Pennsylvania, and the defendant, Hazel E. Cranston, a citizen of the State of New York (R. 19-20). The accident out of which the causes of action arise occurred within the State of New York (R. 20). The third party defendants are both residents of the State of Pennsylvania (R. 18-19).

The Importance of the Questions Raised.

The question that is presented by this application is whether a defendant sued in a United States District Court of the State of New York may bring in, pursuant to Rule 14-a of the Federal Rules of Practice in the light of Section 193, Sub-division 2 and Section 211-a of the Civil Practice Act of the State of New York, third party defendants whom it is alleged occasioned or contributed to the plaintiff's injuries.

It is submitted that the application presents an important question of Federal Law which has not been but should be settled by this court, and the review is sought by virtue of Rule 38, Subdivision 5-b of the Rules of the Supreme Court of the United States.

As will appear from the memorandum which follows, there has been no uniformity of decisions in the district courts, and the question should be determined by this court as to the applicability of Rule 14-a of the rules of this court to cases arising in states where there are limitations upon the right to bring in joint tort feasors at the behest of a defendant.

Questions Presented.

A.

Whether the defendant and third party plaintiff may bring in as a third party defendant in a district court of the United States within the State of New York a party whose negligence is alleged to have caused or contributed to the damage of the plaintiff.

B.

Whether the defendant and third party plaintiff is entitled to bring in the third party defendant and have their interests determined under the third party complaint without an amendment by the plaintiff.

C.

Whether diversity of citizenship is a pre-requisite with respect to bringing in third party defendants.

Reasons for Granting the Writs.

A.

Numerous district courts of the United States have held that Rule 14 by its very raison d'etre precludes a vested right of election of defendants in the original plaintiff, and permits persons alleged to be joint tort feasor to be brought into the case whether or not the original plaintiff elected to put them into the case. The rule has been upheld in Louisiana (*Gray* v. *Hartford Accident & Indemnity Company*, 31 Fed. Supp. 299, 305; 32 Fed. Supp. 335, 336); in Pennsylvania (*Sklar* v. *Hayes*, 1 F. R. D. 415, 416; 1 F. R. D. 594, 596; *Bossard* v. *McGwinn*, 27 Fed. Supp. 412, 413; *Kravas* v. *Great Atlantic & Pacific Tea Company*, 28 Fed. Supp. 66, 67); and in West Virginia (*Crum* v. *Appalachian*

Electric Power Company, 27 Fed. Supp. 138, 139). One district court in New York, prior to the decision in the present case, held that a third party defendant could be joined under similar circumstances in New York. (*Lensch* v. *Boushell Carrier Co.*, 1 F. R. D. 200.)

It is claimed that by virtue of the provisions of Section 193, Sub-division 2 of the New York Civil Practice Act and Section 211-a of the New York Civil Practice Act, as construed by the Court of Appeals of New York that a joint tort feasor may not be added as a defendant at the instance of a defendant. The Court of Appeals of New York has declared:

> "A plaintiff may now sue as many defendants as he pleases whom he thinks may be liable in negligence for his damages. The Legislature has not yet given this same choice to the defendants to bring in other parties, whom they think should be liable either in place of or jointly with those whom the plaintiff has selected. If section 193 is to be extended, it must be by act of the Legislature and not by the fiat of the courts."
>
> *Fox* v. *Western New York Motor Lines, Inc.*, 257 N. Y. 305, 308-309.

The learned District Judge declares in his opinion:

> "The rule is that, where the law of the State in which suit is brought provides for a contribution by the joint tort feasors, a joint tort feasor may be brought in. Such is not the case here." (Fol. 121.)

The Circuit Court of Appeals in the next to the last paragraph of its opinion below said: "We do not feel justified in so construing this rule as to give the defendant a recovery which could not be obtained through any remedy available in the New York State Court" (R. 59).

It is submitted that the decisions below are erroneous. Had the plaintiff sued in the New York Courts and elected to sue both alleged tort feasors and had recovered judgment

against both, the defendant paying the judgment would have a right to contribution against the other by virtue of Section 211-a of the Civil Practice Act.

Neenan v. *Woodside Astoria Transportation Co.*, 261 N. Y. 159, 164-165;

Martin v. *Miller*, 242 A. D. 38-39; Affirmed, 266 N. Y. 668.

Certain anomalies are presented if the decisions of the courts below are correct. The State of Pennsylvania permits contribution between joint tort feasors. In the State of New Jersey, no right of contribution between joint tort feasors can be enforced. An action was instituted in the courts of Pennsylvania and removed to the Federal Court upon the ground of diversity of citizenship. The accident occurred in New Jersey. The Federal District Court held that it was within the province of the defendant to bring in the joint tort feasor.

Sklar v. *Hayes*, 1 F. R. D. 415, 416; 1 F. R. D. 594, 596.

Under the holding of the courts below, had this action been brought in the United States Courts for Pennsylvania, the third parties could have been brought in and required to defend. Yet, because the statutes of New York do not provide a method for bringing in a joint tort feasor at the instance of a defendant, although if brought in by the plaintiff the right of contribution is thereupon held to exist between them, it is asserted that the same recourse may not be had under Rule 14-a.

In other words, had this action been brought by the plaintiff in Pennsylvania, or had the accident occurred in Pennsylvania and the action been brought there, we could have had the relief which we seek. Because, however, it is maintained in a co-ordinate court in the State of New York, the remedy is denied to us.

The Federal Rules govern procedure in the Federal Courts, and even though the state rule may be different, there is no reason why that should be held a limitation upon the rules of Federal Practice.

For example, take the rule of contributory negligence. In the State of New York, except in death cases, where the rule has been changed by statute, it is well established that a plaintiff must establish his freedom from contributory negligence.

Lyman v. *Village of Potsdam*, 228 N. Y. 398, 406.

Although this is a rule of substantive law in New York, the Federal Rule is to the contrary, and where an accident occurred in New York State and the action was tried in the District Court of the State of New York, the United States Supreme Court has declared that the burden rests, nevertheless, upon the defendant contrary to the state rule.

Miller v. *Union P. R. Co.*, 290 U. S. 227, 232, 78 L. Ed. 285, 289.

See also:

Central Vermont Railway Co. v. *White*, 238 U. S. 507, 512, 59 L. Ed. 1433, 1437;

Pokora v. *Wabash R. Co.*, 292 U. S. 98, 100, 78 L. Ed. 1149, 1152.

The learned court below has declared that in the light of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, and *Klaxon Co.* v. *Stentor Electric Co.*, 313 U. S. 487, that it does not feel justified in giving to the defendant a recovery which could not be obtained through any remedy available in the New York State courts (R. 58-59).

It is impossible, within the reasonable, necessarily limited scope of an argument in support of a petition for certiorari, to discuss in detail all of the limitations and impli-

cations pertaining to those two decisions of this court. We submit, however, that the question presented in the cases at bar should be examined by this court, and the two decisions last cited should be re-examined with respect to their applicability to a situation of this character.

Under Section 211-a of the New York Civil Practice Act, contribution among joint tort feasors is permitted. The courts have merely held that the Legislature has not furnished the procedure for permitting a defendant to join in an action a joint tort feasor.

This matter presents a problem of great importance in the administrator of Federal Law in the light of the provisions of Rule 14-a of the Federal Rules of Civil Procedure, and it is submitted that the practice in the Federal Courts should not accord a choice of remedy to a litigant by the accident of whether the plaintiff shall have elected to sue, for instance, in the District Court of the United States for Pennsylvania rather than in the District Court of the United States for New York.

This is not a question similar to that considered in *Erie R. R. Co.* v. *Tompkins,* in which the Court applied the substantive law of a state to this question of legal liability, and resolved a conflict of law which is there discussed. Assuming that the third party defendants were negligent and the plaintiffs free from negligence, their liability exists if enforcement is sought under the law of both New York and Pennsylvania. The question here is whether that liability may be determined within the forum in which the plaintiff has elected to litigate against this particular defendant. The plaintiff is still free under the law of both New York and Pennsylvania to sue the third party defendants and procure an adjudication of their liability. The question is whether a rule of Federal Procedure adopted to secure uniformity of procedure in the Federal Courts shall have uniformity of application.

This is the first case of which we have knowledge that has gone to a Circuit Court of Appeals upon this subject. There has been great diversity of opinion among the District Courts, and the matter has received the consideration of text writers. We submit that the matter should be settled by this court, and that its determination should be made upon what we submit is an important question of Federal Practice.

B.

Mrs. Cranston is entitled to have the liability of the third party determined without requiring an amendment by the plaintiff. Our adversary has argued that in order to hold a third party in, the plaintiff's complaints must be amended, and that this would destroy the diversity of citizenship. By reason of what we shall point out in subdivision c, the question of diversity of citizenship is immaterial as to a third party defendant. It should be observed that the plaintiff has at no time indicated an unwillingness to amend nor has he been given an opportunity to do so if that is prerequisite. The decisions in both the United States Circuit Court of Appeals and the District Court have turned upon the question of the power to bring them in, and there has been no distinction drawn as to whether or not the plaintiff elects to amend. If that is prerequisite, the plaintiff should be given that right. However, in *Sklar* v. *Hayes*, 1 F. R. D. 415, 416, it was held that there is no force in this argument. It is held that the defendant may plead for the plaintiff.

Gray v. *Hartford Accident & Indemnity Company*, 31 Fed. Supp. 229, 305.

It should be observed, however, that the plaintiff did not oppose bringing in a third party defendant (R. 11, 31). At no time has the plaintiff declined the opportunity to plead against the third party defendants, and the judgment

below has not turned upon that question. The courts have held that there is no authority to bring the third party in under any conditions, and have not made it conditional upon the third party amending if the third party elects to do so. Rule 14-a provides:

> "The plaintiff may amend his pleadings to assert against the third party defendant any claim which the plaintiff might have asserted against the third party defendant had he been joined originally as a defendant."

We submit that there is no requirement that the plaintiff amend, but as he has not declined to do so, and if such a condition is necessary, the judgment should have been made conditional upon his refusal so to do.

C.

Diversity of citizenship is not prerequisite with respect to bringing in third party defendants. If such a construction is put upon Rule 14, it will result that in most cases in the Federal jurisdiction the rule will be absolutely useless, and there are numerous decisions which state that such requirement is not prerequisite.

Wichita Railroad & L. Co. v. *Public Utilities Commission,* 260 U. S. 48, 53-54;

Williams v. *Keyes,* 125 Fed. 2nd 208, 209;

Morrell v. *United Air Lines Transport Corporation,* 29 Fed. Supp. 757, 758;

Gray v. *Hartford Accident & Indemnity Company,* 31 Fed. Supp. 299, 305;

Bossard v. *McGwinn,* 27 Fed. Supp. 412-413;

Kravas v. *Great Atlantic & Pacific Tea Company,* 28 Fed. Supp. 66, 67;

Crum v. *Appalachian Electric Power Company,* 27 Fed. Supp. 138, 139.

Conclusion.

Rule 1 of the Federal Rules of Procedure provides that the rule "shall be construed to secure the just, speedy, and inexpensive determination of every action." It is respectfully submitted that the rules should be as applicable to a case brought in a Federal District Court sitting in the State of New York when the accident occurred in New York or Pennsylvania, to the same effect as could be done if the accident had been brought in a United States District Court for Pennsylvania, regardless of whether the accident occurred in New York or Pennsylvania.

For the reasons herein set forth, it is respectfully submitted that the petition for writ of certiorari in the instant cases should be granted.

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